No. 20584

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SULLY-MILLER CONTRACTING COMPANY AND CONSTRUCTION TEAMSTERS UNION, LOCAL 606,

Respondents.

BRIEF FOR RESPONDENT SULLY-MILLER CONTRACTING COMPANY.

DILLAVOU & COX,
C. C. DILLAVOU,
GEORGE M. COX,
611 Wilshire Boulevard,
Los Angeles California,

Attorneys for Respondent,
Sully-Miller Contracting Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

No. 20584

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SULLY-MILLER CONTRACTING COMPANY AND CONSTRUCTION TEAMSTERS UNION, LOCAL 606,

Respondents.

BRIEF FOR RESPONDENT SULLY-MILLER CONTRACTING COMPANY.

SPECIFICATION OF ERROR.

To require Respondent Employer to reinstate Lucero with back-pay is not an appropriate remedy where Lucero's original hiring employment was in violation of a lawful exclusive hiring hall agreement.

ARGUMENT.

Lucero was hired in violation of the contract and was as guilty of the violation as his employer was. In order to remedy the violation, he was, at the instance of the union, discharged. The Board has found that the discharge was unlawfully discriminatory and though we

feel that conclusion is questionable, the more important issue is the "Remedy". The Board would require Respondent Employer to reinstate Lucero with back-pay. We submit that Lucero should not be allowed to profit from his own wrong by being reinstated and rewarded with back-pay in connection with a job that he had secured improperly in the first instance. When Lucero was discharged, he lost nothing to which he was entitled.

Respondent Employer had no meaningful alternative to its compliance with the demand of Respondent Union to discharge Lucero. The union was indisputably correct about the original violation and Respondent Employer was duty bound to rectify the situation. If it ignored the union's demand, it would compound the wrong. National labor policy favors the peaceful resolution of disputes pursuant to the provisions of collective bargaining agreements which have resulted from good faith bargaining among the parties. Respondents as parties to such a collective bargaining agreement should not be penalized financially if Respondent Employer has voluntarily undertaken to rectify a violation of such a contract. The Board itself has conceded that Respondent's conduct from the record presented to it does not reveal an attitude of general opposition to the purposes of the Act and accordingly, the Board has ordered only that Respondent cease and desist from engaging in the violations found in the particular case. We submit that such a cease and desist order without the necessity of penalizing Respondent with a reinstatement and back-

pay order will appropriately remedy the violations and accomplish the purposes of the Act. The balance of the order is penal and would force Respondents to perpetuate a conceded violation of the lawful contract.

For the foregoing reasons the provisions of the Boards order requiring reinstatement and back-pay should not be enforced.

Respectfully submitted,

DILLAVOU & COX,
C. C. DILLAVOU,
GEORGE M. COX,
By GEORGE M. COX,
Attorneys for Respondent Sully-Miller Contracting Company.

Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

George M. Cox

No. 20584

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SULLY-MILLER CONTRACTING COMPANY, and CONSTRUCTION TEAMSTERS UNION, LOCAL 606,

Respondents.

BRIEF FOR RESPONDENT CONSTRUCTION TEAMSTERS UNION, LOCAL 606.

BRUNDAGE & HACKLER,
CHARLES K. HACKLER,
JULIUS REICH,
1621 West 9th Street,
Los Angeles, Calif. 90015,

Attorneys for Respondent, Construction Teamsters Union, Local 606.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.
46

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Case

No. 20584

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SULLY-MILLER CONTRACTING COMPANY, and CONSTRUCTION TEAMSTERS UNION, LOCAL 606,

Respondents.

BRIEF FOR RESPONDENT CONSTRUCTION TEAMSTERS UNION, LOCAL 606.

STATEMENT OF FACTS.

The Respondent Construction Teamsters Union Local No. 606 (herein called "the Union") and the respondent Sully-Miller Contracting Company (herein called "the Employer"), were party to a collective bargaining agreement [G.C. 2] which required the Employer to utilize the Union's open and non-discriminatory hiring hall as its exclusive source of workmen [Tr. 17; R. 33-34]. Valentin Lucero, the charging party, was admittedly neither hired through the hall [Tr. 25; R. 42] nor a member of the Union [R. 42]; and his discharge was procured by the Union.

Although there exists testimonial conflict as to the reason for Lucero's termination, for the purpose of this proceeding the Union accepts the Board's findings that his discharge was secured by the Union because of his lack of Union membership.

ARGUMENT.

1. Introduction.

The Union will limit itself to a showing that the remedy proposed by the Board is not only inappropriate and inequitable, but that it is impermissible under the Act. That remedy includes a requirement that the Union withdraw its opposition to the employment of Lucero, and make him whole [R. 29, Par. II., 2(a) and (b)].

The Union's contract with the Employer contained a provision requiring the Employer to use the Union's out-of-work list and dispatch system as the Employer's sole and exclusive source of workmen [G.C. 2, Art. II, B., 1 and 2; R. 33]. Lucero was not hired by the Employer in accordance with this requirement and was, therefore, on the job in violation of a valid provision of the parties' collective bargaining agreement. While the Union acknowledges that under the Board's findings Lucero's discharge was demanded for an improper reason, Lucero nonetheless had no right to retain that position, and he should not, therefore, be riveted into that job by a court order, ahead of others whose seniority entitles them to it.

For its argument, the Union relies upon the argument section of the brief its counsel filed in *NLRB v. Painters District Council No. 52,* Ninth Circuit, No. 20505, and pursuant to the stipulation entered into with the Board, the argument section of that brief is incorporated herein by reference. There remains, however, one point which is pressed by the Board in the present case and not covered in the other brief, and that is the Board's argument concerning an alleged "waiver."

2. The Concept of "Waiver" Is Not Applicable to the Present Case.

The present case involves employment in the construction industry, which is unlike employment in manufacturing or other industries. Construction work is intermittent and generally available on a job-to-job basis.[1] Between jobs an employer will lay off most, if not all of its employees. These workers then seek, through the Union's dispatch hall, similar employment with other companies.

The Union maintains various out-of-work lists for (a) workmen who, within the past five years have performed work in the industry and in the area, and (b) workmen who have not been so employed [G.C. 2, Art. II, para. B., §4(a), (b) and (c)]. Workmen are dispatched in the order their names appear on the various lists and those on the (b) list are not called until the (a) list has been exhausted. Thus, the available work is fairly distributed to workers on the basis of their service in the industry and the length of time they have been out of work.

The out-of-work lists serve the purpose of a seniority roster in a manufacturing plant, since those who have the greatest seniority in layoff, *i.e.*, those who have been out of work the longest, are the first ones dispatched to available employment in their respective grouping. The purpose behind requiring employers exclusively to use the dispatch hall rather than their own

---

[1]See, *e.g.*, speech by Saul J. Jaffe, Associate Solicitor of the Board, reported in 45 L.R.R.M. 71 (1960): "Fluidity of employment in the building and construction industry and the short-term nature of construction projects make for the casual and occasional nature of construction employment."

sources of employment, is to provide an equal opportunity at available employment to all unemployed workers, based solely upon their relative seniority and the order in which they signified their availability for work.

The employer who hires outside of this referral system, and the worker who secures employment from such an employer, are not cheating the union which maintains the out-of-work list. They are discriminating against each of the hundreds of workmen who are part of the referral system and who are waiting, in order of seniority and availability, to be dispatched.

Applying these principles to the facts of the present case, it is obviously meaningless to say that the Union "waived" the Employer's violation of the dispatch rules, since the Union cannot lawfully make such a waiver. For example, in *Miranda Fuel Co.,* 140 N.L.R.B. 181 (1962), *enforcement denied, NLRB v. Miranda Fuel Co.,* 326 F.2d 172 (2d Cir. 1962), the Board held that it was unlawful for a union to control the seniority rights of employees in an arbitrary manner, which would be the case here if the Union could be said to have "permitted" Lucero to get in line ahead of all the other workers on the out-of-work list. "Waiver" of the contract requirement that Lucero take his place on the out-of-work list would itself constitute a violation of the National Labor Relations Act, and would be discriminatory of Lucero's fellow workers. See *Miranda Fuel Co., supra.*

The "Waiver" argument should not be considered for another reason, because it primarily relates to conduct of the Union's predecessor, Local 692, and in this regard, the Union made timely objections to the introduction of such evidence on the ground that it went beyond the pleadings since only the Union and not Local 692 was a respondent [Tr. 11, lines 10-18], and on the further ground that it was hearsay and not admissible because it related to persons not party to the Board's proceeding (and thus would not constitute an admission) [Tr. 12, lines 9-14].

Should the Board's order requiring the Union to withdraw its objection to the employment of Lucero be enforced, it would result in Lucero gaining super-seniority at the expense of his fellow workers. Is Lucero, who cheated his fellow workers out of employment by circumventing the out-of-work list, now to be made whole as though he had lawfully acquired the job which he in fact secured in violation of contractual commitments? This would constitute a reward for duplicity.

It is enough of a remedy in this case to enforce the Board's order exclusive of the objected-to portions. To make Lucero whole for earnings to which he was not entitled in the first place is impermissible and inequitable. It would not further the policies of the Act.

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the respondent's brief in case no. 20505, paragraph II, 2(a) and (b) of the Board's order should not be enforced.

Respectfully submitted,

BRUNDAGE & HACKLER,
CHARLES K. HACKLER,
JULIUS REICH,
By JULIUS REICH,
Attorneys for Respondent, Construction Teamsters Union, Local 606.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIUS REICH